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IN THE

Supreme Court of the United States

October Term, 1943

No. 338

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HEARST PUBLICATIONS, INCORPORATED,

Respondent.

BRIEF OF RESPONDENT HEARST PUBLICATIONS, INCORPORATED, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX.

	PAGE
Opinion below	1
Jurisdiction	2
"Statement"	2
Argument	17
1. The decision of the court below in the instant case does not conflict with decisions of this Court or other Circuit Courts of Appeal	17
2. The court below correctly determined that the word "employee" as used in the National Labor Relations Act must be given its conventional meaning	24
3. The court below correctly ruled that there was no substantial evidence supporting the finding of the Board that newsboys are employees. In so holding the Court correctly applied the established and accepted precedents	29
4. The application of the aforegoing rules to news vendors in respect to their vending activities is not changed by the fact that certain of such news vendors received "checks" for services performed to respondent, separate and apart from their vending activities	33
Conclusion	35

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Anglin v. Empire Star Mines Co., 129 Fed. (2d) 914	25
Baliński v. Press Pub. Co. (Pa.), 179 Atl. 897	30
Bernat v. The Star Chronicle Pub. Co. (Mo.), 84 S. W. (2d) 429	30
Birmingham Post v. Sturgeon (Ala.), 149 So. 74	30
Bohanon v. McClatchy Pub. Co., 16 Cal. App. (2d) 188, 60 Pac. (2d) 510	30
Bowman v. Pace, 119 Fed. (2d) 859	26
Brotherhood of Railway and Steamship Clerks, etc. v. United Transport Service Employees of America, ... Fed. (2d) ..... decided August 2, 1943	22
Butt v. San Diego Pub. Co., 21 Cal. App. (2d) 429, 69 Pac. (2d) 216	30
Call v. Detroit Journal Co., 191 Mich. 405, 158 N. 36	30
Childers v. Commissioner, 80 Fed. (2d) 27	32
Creswell v. Charlotte News Pub. Co. (N. C.), 168 S. E. 408	30
Federal Trade Commission v. Raladam Co., 283 U. S. 643	21
Fidelity & Casualty Co. v. Ind. Acc. Commission, 191 Cal. 404, 216 Pac. 578	32
Florida Pub. Co. v. Lourcey (Fla.), 193 So. 847	30
Gallaher v. Ricketts, 187 So. 351	31
Gray v. Powell, 314 U. S. 402	18
Hampton v. Macon News Printing Co., 64 Ga. App. 150, 12 S. E. (2d) 425	31
Hartford Accident & Indemnity Co. v. I. A. C., 123 Cal. App. 151, 10 Pac. (2d) 1035	30
Hillcone S. S. Co. v. Steffen, 136 Fed. (2d) 965	24
Hirst and Company v. Gentsch, 133 Fed. (2d) 247	28
Indian Refining Co. v. Dallam, 119 Fed. (2d) 417	25

PAGE

Jacksonville Paper Co. v. National Labor Relations Board, 137 Fed. (2d) 148 23

Joslin v. Idaho Time Pub. Co. (Idaho), 53 Pac. (2d) 323 30

New York Indemnity Company v. Industrial Accident Commission, 213 Cal. 43, 1 Pac. (2d) 12 29

Oklahoma Pub. Co. v. Greenlee, 150 Okla. 69, 300 Pac. 684 30

Pacific Employers Insurance Co. v. Ind. Acc. Commission, 3 Cal. (2d) 759, 47 Pac. (2d) 270 31

People v. Masiello, 31 N. Y. S. (2d) 512 30

Radio City Music Hall Corp. v. United States, 135 Fed. (2d) 715 ..... 25, 32

Rathbun v. Payne, 21 Cal. App. (2d) 49, 68 Pac. (2d) 291 30

Ridge Country Club v. The United States, 135 Fed. (2d) 718 ..... 25, 34

Robinson v. Baltimore & O. R. Co., 237 U. S. 84 24

Rochester Telephone Corp. v. United States, 307 U. S. 125 20

Salt Lake Tribune Publishing Company v. Ind. Acc. Commission, 99 Utah 259, 102 Pac. (2d) 307 31

Scatola, In re, 282 N. Y. 689, 26 N. E. (2d) 815 31

Shields v. Utah Idaho Central R. Co., 305 U. S. 177 20

South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251 20

State Compensation Insurance Fund v. Industrial Accident Commission, 2 Cal. (2d) 94, 39 Pac. (2d) 201 34

State Compensation Fund v. I. A. C., 216 Cal. 351, 14 Pac. (2d) 306 30

Texas Co. v. Higgins, 118 Fed. (2d) 636 25

United States v. American Trucking Ass'n's., Inc., 310 U. S. 534 21

United States v. Griswold, 124 Fed. (2d) 599 25

Walker v. Altmeyer (C. C. A. 2d), decided July 12, 1943 18

Walling v. Sanders, 136 Fed. (2d) 78 27

Warner Co. v. Norton, 137 Fed. (2d) 57 22

PAGE

Wells-Fargo Co. v. Taylor, 237 U. S. 84 25

Western Indemnity Co. v. Pillsbury, 172 Cal. 807 32

Wilson v. Times Printing Co., 158 Wash. 95, 290 Pac. 691 31

STATUTES.

Bituminous Coal Conservation Act of 1935 19

Communications Act of 1934 21

Fair Labor Standards Act 26

Judicial Code, Sec. 240(a) 2

National Labor Relations Act, Sec. 10(e) 2

National Labor Relations Act, Sec. 10(f) 2

Statutes of California 1917, Chap. 586, Sec. 60 (now Labor Code, Sec. 3202) 29

Statutes of California 1917, Chap. 586, Sec. 67 (now Labor Code, Sec. 5953) 29

The Bituminous Coal Act of 1937 18

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vs.

HEARST PUBLICATIONS, INCORPORATED,

Respondent.

BRIEF OF RESPONDENT HEARST PUBLICATIONS, INCORPORATED, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent Hearst Publications, Incorporated, Los Angeles Evening Herald and Express Department, publisher of the Los Angeles Evening Herald and Express (hereinafter referred to as "Herald") presents the following brief in opposition to the National Labor Relations Board's petition for a writ of certiorari in case No. 338 (being No. 10115 in the Court below).

Opinion Below.

The opinion of the Circuit Court of Appeals is reported in 136 Fed. (2d) 608.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on June 10, 1943. The Board's petition for writ of certiorari was filed September 9, 1943. Notice of the filing of such petition with copy thereof and of the record was served on counsel for this respondent on September 18, 1943. Jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Sec. 10(e) and (f) of the National Labor Relations Act.

"Statement."

We respectfully submit that the "Statement" (Petition, pp. 3 to 12) prepared by the petitioner is in many respects wholly inaccurate and is not supported by the record. Despite the fact that this respondent is affected only by testimony of vendors selling its publication and that many stipulations were entered into by counsel for this respondent and counsel for the Board to the effect that the testimony of vendors selling other publications had no application to this respondent [R. 1294, 1310, 1312, 1328, 1372, 1422, 1432, 1453, 1475], the petitioner has attempted to state a summary of all of the evidence taken in four separate proceedings and apparently deemed, by petitioner, to be applicable to all respondents. This summary, based on all of the testimony taken, is, quite naturally, inaccurate in many respects in application to this respondent. Moreover, where the summary contains citations to the record of testimony deemed specifically applicable to this respondent, examination discloses that in some instances the cited testimony does not support the text and in other instances the cited testimony is directly contrary to it. The sum-

mary is also inaccurate in that it omits much testimony deemed important by the Ninth Circuit Court of Appeals and commented upon in the opinion of that Court.

Accordingly, the "Statement" has been carefully compared with the record and variances between the two and the omissions noted.*

The "Statement" recites (P. 4) "." . . . the newsboys . . . are not boys, as the name implies, but are mature or elderly men . . . ." The record shows that many vendors are 21 to 22 years of age and many are high school boys [R. 859-860].

The "Statement" recites (P. 5) "Many of them (news vendors) have long *service* records." What the record actually shows is that many vendors have owned or occupied their same corners for many years. Thus the witness Apice [R. 1117], whose testimony is referred to in the "Statement", occupied his corner about seven years and stated that he obtained the corner from," . . . a friend of mine." The witness Relish borrowed money and bought his corner for $100.00 [R. 736]. At the time of the hearing, he had occupied it for about six years [R. 727]. The witnesses Bryant and Faber; in effect, exchanged corners. Bryant purchased one corner from Faber for $600.00 and sold another corner to Faber for $250.00 [R. 924, 925, 926], on or about June 1, 1939 [R. 922] The witness Schullman purchased his corner from his predecessor on a deal which permitted the former owner to go to college while Schullman paid him a stated sum per week. The cost of the corner to Schullman was about $1200.00, and

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*References to the Petition are noted thus: (P. ....) and to the record thus: [R. ....].

at the time of the hearing (June 10 to June 27, 1940) he had occupied the corner for about fifteen years [R. 930-931]. The witness Gallagher bought his corner some twenty years prior to the date of the hearing, from the previous owner, for $300.00 and still owned and occupied the corner as of the date of the hearing [R. 939]. The witness Newman purchased his corner for about $250.00, and at the time of the hearing had owned and occupied it for about fourteen years [R. 945]. The witness Powers bought the corner, on which Pat Comorre, the organizer of the Union, was vending newspapers and magazines at the time of the hearing, from the daughter of the deceased former owner, for $150.00 [R. 999-1003] The Bill of Sale for the corner, set forth in full in the record [Herald Ex. No. 5, R. 481, introduced in evidence at R. 1002], was dated January 21, 1939.

The "Statement" recites that newsboys are "hired" and "fired", "disciplined, directed and supervised by respondents through supervisory employees known as the 'District Manager' or the 'Districtman'". (P. 6). The record reference "Herald, R. 605-607", deals, however, only with the testimony of the Circulation Manager concerning the duties of "wholesalers", sometimes called "check men", whose duties as wholesalers have no connection with their independent business of vending newspapers [R. 606] and who are, solely in the performance of such wholesaling duties, admitted to be employees. This respondent has at all times been willing to negotiate with the representatives of "wholesalers" concerning hours, wages and conditions of employment of "wholesalers" as such, and the status of such wholesalers is not here in dispute.

The "Statement" recites (P. 6): "The District Managers keep lists of newsboys in their districts . . . ." The

record reference shows that what was kept were "route sheets", showing the *places* where papers were left, and the *approximate number* of papers delivered to such places [R. 572], and that is all the route sheets show. Such "route sheets" were kept by the individual District Managers to aid them in delivering the number of papers ordered to the particular corner [R. 573]. No records whatsoever, even copies of route sheets, were kept or maintained at the plant of the company [R. 575-1032]. When the Trial Examiner requested a list of the names and locations of vendors, the same was procured by sending a man into the field to ascertain the required information [R. 630-635]. The only names shown in the records of this respondent were the names of "wholesalers", discussed hereinabove, which names appeared on the company payrolls.

The "Statement" recites (P. 6): "The District Managers determine the number of newspapers to be taken out each day for distribution by the check men and newsboys in their respective districts in the light of the importance of the day's headline, sometimes doubling or trebling the usual number." The aforegoing statement is an example of the complete confusion resulting from an attempt, by one quite apparently not familiar with the record in this case, to epitomize in one sentence the duties of Districtmen and wholesalers in relation to the delivery of newspapers to the independent newsboys or vendors.

As pointed out hereinabove, "wholesalers" are hired by this respondent, or its independent dealers, to distribute or parcel out newspapers to vendors in certain small, specified areas [R. 604-606]. Newsboys do not distribute newspapers. The record reference, cited by the Board

[R. 1048] but apparently completely misunderstood by the writer of the "Statement", describes the method by which district managers determine how many *extra* papers they will take on their delivery runs. Thus the number of *extras* is determined by the district manager from the importance of the headlines, etc., but has nothing whatever to do with the newsboy's "standing order" or "base order", which is determined, lowered or raised by, and at the will of, the individual vendor [R. 1048-1049]. The district manager delivers to the vendor his "base" or "standing" order [R. 1048], and also has available on the same truck the above described "extras", a portion of which the vendor may or may not buy, as he chooses [R. 1051].

The "Statement" recited (P. 7):

> "They keep the newsboys informed as to how news is developing . . ."

The record shows that exactly the contrary was true [R. 566-567].

> ". . . what breaks to anticipate . . ."

The record references cited concern only the advising of news vendors of infrequent advanced press times for the proposed issuance of prize fight or election extras or of opportunities to sell at the "Coliseum" during special events.

The above quoted language implies a continuous course of advice and supervision over a period of years. The record in this case shows an extremely different situation.

The record shows that following presidential elections (every four years) and state elections (every two years), an early morning extra was put out. This necessitated an earlier press start and an earlier delivery to corners.

News vendors were advised of such fact by district managers and by notice in the newspapers. The same practice once prevailed with respect to "prize fight" extras, but no such extras had been issued for some three or four years prior to the date of the hearing [R. 579]. The Record also shows that infrequently news vendors were advised of opportunities to sell at special events held at the Los Angeles Coliseum. These events also occurred very infrequently. Thus the witness Kadish, who at the time of the hearing had been selling newspapers for ten or eleven years [R. 804] testified that he sold newspapers at the Coliseum twice during that period, once during a Shrine Convention, and once during an American Legion Convention [R. 806].

". . . How to call important headlines and how to play up special features . . ."

There is not one word of testimony in the record referred to, supporting the aforegoing statement. An examination of the record discloses that no instructions whatever are given news vendors [R. 600-601, 596, 692, 697].

The "Statement" recites (P. 7): "In addition, both the Examiner and the Herald maintain further supervision over the checkmen and newsboys through 'checkers' who patrol the districts, noting whether the checkmen and newsboys keep hours, 'hustle' with due diligence, follow instructions as to the manner of displaying and calling papers, and otherwise conduct themselves according to rules." The record references cited show the exact contrary to be true. The Circulation Manager of respondent testified: "We have checkers who check the district men and do not check the newsboys, but the district men" [R. 575] . . . These checkers are not supposed to discuss

anything or talk with or give any orders whatever to newsboys" [R. 576]. That the duties of the two checkers employed were only to observe "The circulation, yes, the revision of the territory, and whether or not the district manager appears to be neglecting a part of his territory or all of it or none of it . . . for instance he will report that the papers are laid on a certain corner, due at a certain time and they arrive later than that time. He may also report the time that the Daily News of a similar edition arrived at that place. On a later edition, the last edition of the day, he will report the time that our papers reached some parts of the territory and the time that the Times and Examiner reaches those places, with their first edition of the evening . . . . I know of no other points . . ." on which they check [R. 577].

The "Statement" recites (P. 7): "The checkers make written reports to the Herald and the Examiner, and when necessary recommend newsboys for discharge, discipline, or reprimand in a written instruction to the district manager."

The testimony cited shows that the checkers make reports on the "points" above described, after which the Circulation Manager testified, ". . . I merely make a memorandum of it and throw the report away . . . or send it to the branch who in turn will take it up doubtless with the district manager in whose territory the complaint, if any occurred."

The evidence thus discloses that this respondent employs two checkers to check its own employees, viz: the district managers, in the performance of their duties, and that they have no contact with nor duties in respect of the news vendors and make no reports concerning news vendors' activities.

The "Statement" recites (P. 8): "The newsboy obtains employment by applying at the plant to the district manager, who then assigns him to a particular spot, if an opening is available.".

The testimony discloses [R. 590, 595, 606, 638, 696] that newsboys wishing to sell papers apply to district managers, in all parts of the city, for openings, meaning unoccupied corners, and if there is such a corner in the district the newsboy is furnished papers. The only district managers who work out of the main plant are the managers of the downtown area [R. 590]. All others work out of branch offices [R. 638, 682, 696]. As hereinabove pointed out, "openings", that is, unoccupied corners, are seldom available in the downtown district, and if they are left vacant it is usually because they are unprofitable [R. 599]. Profitable corners, on the contrary, pass from buyer to buyer for large sums of money, without the consent or knowledge of respondent [R. 1039, 1040]. The witnesses Relish [R. 736], Bryant and Faber [R. 924-926], Schullman, one time president of the Union [R. 930], Gallagher [R. 939], Newman [R. 945], and Powers and Comorre, the Union organizer [R. 999], all purchased their corners from previous owners. No one of these newsboys even thought it necessary to consult with representatives of the respondent in such matters. The witness Comorre testified that the witness Powers bought his corner from the daughter of the deceased former owner; that he (Comorre) Powers and Comorre's eldest son all worked the corner and that no one of them ever asked respondent's representatives to consent to such arrangement [R. 1004-1005].

The "Statement" recites (P. 8): "All respondents also furnish transportation to the newsboys from the plant to

their respective corners and after work is over bring them back." In support of this statement is a reference to the testimony of one district manager of respondent that on one or two occasions, vendors living near the plant of respondent in downtown Los Angeles hopped a ride on the truck delivering the first morning edition to their corners to save car fare, but on no occasion did they ride back [R. 995-997]. This seems obvious in view of the fact that the last trip of the truck to their respective corners brings the last edition of the paper which they are selling. This isolated instance can hardly be termed "furnishing transportation."

The "Statement" recites (P. 8): "The newsboys are subject to removal at will and to transfer or disciplinary layoffs by the district managers."

Petitioner cites seven instances in the record in support of the aforegoing assertion. The record discloses that papers were refused to one vendor who was drunk. When he sobered up, papers were again given him [R. 601]. Papers were refused another vendor when he refused to pay for papers already received [R. 901] and to another for selling at less than the established retail price [R. 876]. Another vendor was charged, by an irate father with making obscene remarks to a small girl, and another engaged in a fist fight with the owner of the drug store on the corner at which the vendor sold. In the first mentioned instance, neighborhood feeling was running high, inflamed by a recent murder of two little girls. For the protection of the vendor, papers were temporarily refused him, and when neighborhood feeling subsided sales were again made to him [R. 1146]. In the other instance a better corner was found for the vendor [R. 769]. In another instance, papers were refused to a vendor because

of repeated complaints of the owner of a food market of the vendor's uncleanliness and body odor [A. 741-743, 968-972]. At the time of the hearing, this vendor was relief man for the Herald vendor at Sixth and Spring Streets in Los Angeles [R. 967-969]. The last instance cited by the petitioner was that involving the witness Relish. On or about December 21, 1934, a letter was received from the Downtown Business Men's Association, complaining about the activities of this vendor [Herald Ex. No. 2—R. 483—introduced in evidence at R. 918]. Relish testified that he was told by the Herald Superintendent of Street Sales "that I would have to get rid of my corner and in the meanwhile to put somebody to stay on my corner until I could get somebody to sell it and get rid of it . . . ." [R. 917, 918]. Relish, however, engaged an attorney, who wrote respondent as follows:

> "Harry Relish, who sells magazines and newspapers at the northeast corner of Fifth and Spring Streets, this city, tells me that you discontinued selling him your papers at the written request of the Downtown Business Men's Assn., the later named being instigated by the Rowan Building . . . ."

The attorney further charged a conspiracy to deprive his client of his livelihood [Herald Ex. No. 4—R. 480—introduced in evidence at R. 1039]. The activities of Relish and his attorney resulted in the sending of another letter to respondent by the Association, informing respondent that in view of the investment Relish had in the corner, he should be entitled to "recover his investment" [Herald Ex. No. 3—R. 485—introduced in evidence at R. 920]. Accordingly, respondent continued to sell newspapers to Relish.

The aforegoing instances, occurring over a period of five or six years, in a group averaging several hundred vendors, show only isolated instances of reasonable refusals to sell newspapers to independent vendors and do not substantiate the petitioner's conclusion of arbitrary discharges of employees "at will."

In a footnote (P. 8) petitioner charges the exercise by respondent of supervision in "relaying from the circulation manager instructions relative to price changes, the time of the appearance of an extra on the streets, or the manner in which the newspaper is to be displayed."

This sentence implies a constant and unremitting supervision by respondent's employees of the vendors. Thus petitioner uses the plural "price changes." The record shows, however, that there was only one price change made during the period under examination. In 1937, the retail price of the Herald was raised from three to five cents. The vendors were advised both direct and by notice published in the paper [R. 558-559; 1012].

The infrequency of the issuance of extras has already been discussed hereinabove.

As to the display of papers, the record shows that as a result of conferences held in 1937, between representatives of the Herald and the News, it was decided that neither organization would object to the sale by a news vendor of both competing newspapers if the vendor was willing to sell both [R. 555 *et seq.*]. Within a week or so after the news vendors began to sell both newspapers, friction arose between the various district men representing the respective papers over the matter and the circulation managers of the two papers decided that future friction could be avoided by having the News carried folded outside of the Herald [R. 563]. Through the branch managers and

the district managers, notice of the understanding between the two organizations was given to the news vendors and they were asked to cooperate. Several news vendors testified to conversations regarding the method of displaying the two competing papers, which conversations took place at or about the time the vendors undertook to sell both, in 1937, but there was no testimony of any conversations indicating discussions or suggestions concerning the manner of display of papers in the years intervening between 1937 and June, 1940, the date of the hearing in the matter. Thus, notifying the news vendors of one price change and of, possibly, four or five early press runs, and one request to such vendors to give competing publications an even break on display, during a period of five or six years, is pictured as supervision.

In admitting that practically all of the vendors selling this respondent's newspaper also sold magazines (P. 10), the petitioner attempts, by grouping the four respondents in this mater together, to gloss over the undenaible fact that all four newsapers are competitors, and that all of the news vendors selling this respondent's newspapers are selling at least one or more of such competing newspapers. In addition to selling these competing publications, the vendors generally sold Liberty, Collier's, Saturday Evening Post, Look, The People's World, Los Angeles Daily Journal, Wall Street Journal, Time, "Ham and Eggs", Rose Bowl folders and New Year editions, as well as the B'Nai B'Brith Messenger and the Jewish Voice (R. 714, 718, 727, 744, 746, 793, 818, 830, 841, 849, 866, 875, 879, 886, 922, 932, 940, 945, 977, 981-1027).

The "Statement" recites (P. 11): "The Newsboys are required to sell the papers at the prices fixed by respondents." The fact is that all newspapers and magazines,

like many other articles, are sold at fixed advertised prices. The public will seldom pay more than the established price, but in the case of shortage of newspapers sometimes do so [R. 569-570] However, no limitation whatever is laid on the vendors in the matter of selling for more than the advertised price [R. 570] and there was testimony of only one instance of the sale by a vendor for less than the advertised price [R. 876].

The "Statement" recites (P. 11): "They do not pay for the papers when they get them, but at the end of each day return unsold papers and are charged a certain amount specified by respondents for papers not returned."

In its application to this respondent, the aforegoing sentence is inaccurate. Only news vendors in the down-town district are allowed to return all unsold copies of this respondent's newspaper. In other districts they pay for all they take, whether they sell them or not [R. 648, 658, 687, 709, 752, 851, 883, 944, 952]. Some news vendors check in and pay for their papers at the close of the day [R. 686], others in the middle of the day for all papers previously purchased as well as those purchased but not at the time of checking in, resold [R. 723], and others check in the next day [R. 943]. News vendors who are allowed returns take all risk of loss for credit extended and pay for all papers destroyed or stolen. News vendors who do not get returns, of course, do likewise [R. 688, 689].

The "Statement" recites (P. 11): "The checkmen and newsboys regard themselves as employees. . . . were so regarded by representatives of respondents . . . and by the public."

It is also admitted in the record [R. 605] that in so far as wholesalers, also called checkmen, perform wholesaling

duties for Respondent, they are employees, and that such limited employment has no connection with the wholesalers' independent occupation of vending newspapers and magazines [R. 582]. News vendors do not generally regard themselves as employees [R. 943, 946, 928]. The portions of the record cited in support of the alleged public reaction are those portions having to do with the altercations between Gish and the food market proprietor, Apice and the father of the young girl, and Stewart and the drug store proprietor, discussed hereinabove. The testimony cited does not support the conclusion drawn by Petitioner.

Although a Union was formed, which sought to negotiate, it was admitted by the organizer that the representatives of this Respondent ". . . made it very clear that they would not negotiate a contract—or consider negotiating a contract until it was decided whether newsboys were employees . . ." [R. 672].

The petitioner wholly fails to call the attention of this Court to the undisputed fact that many news vendors were themselves employers. The witness Schullman testified that he employed five newsboys, paying them a commission on their sales [R. 931] and that he hired and fired his five newsboys at will [R. 937]. The witness Gallagher testified that he employed five assistants on a commission basis [R. 939]; that he employed at least five newsboys all during the twenty year period in which he operated the corner and that at no time had a district manager of respondent ever said anything to him concerning his employees. The witness Newman testified that he employed three boys after school, to whom he paid a salary and commission [R. 946]. The witness Klein testified that he employed two newsboys to work for him after school and that he paid his relief man on an hourly basis [R. 982]. The

witness Spillers also employed one assistant [R. 883]. The record also discloses that news vendors employed and dismissed their own relief men [R. 720, 737, 743, 931, 939, 946, 982, 1004]. The organizer of the Union, Pat Comorre, sold papers as a relief man for his brother-in-law, Harry Powers [R. 1009]. Occasionally Pat Comorre's son sold papers on the corner [R. 1005, 1010]. The witness Relish testified that he picked his own relief man [R. 738]. The witness Faber testified that he picked his own relief man and paid him a regular wage [R. 720]. The witness Gish worked as relief man for Schwartz [R. 743].

It should be noted also that the Board made its finding of employment of all news vendors on the testimony of isolated instances of alleged control by twelve news vendors. No attempt was made by counsel for the Board to take the testimony of the rest of the 200 to 250 vendors claimed to be within the unit. During the hearing, this matter was raised by the Trial Examiner and, after discussion of the matter, he wired the Chief Trial Examiner in Washington for instructions. He received the following answer:

> "Evidence should be introduced to show that persons signing cards are employees. Burden is on the petitioner to show this fact. I assume respondent denies card signers occupy the position of employees. If so, evidence should be introduced to show that each individual does." [R. 1493.]

This telegram was received after the case involving this respondent was, in practical effect, closed. No additional testimony of vendors of this respondent's publication was introduced, despite the warning of the Trial Examiner that evidence had not been introduced ". . . to show what each individual does" [R. 1513].

ARGUMENT.

1. The Decision of the Court Below in the Instant Case Does Not Conflict With Decisions of This Court or Other Circuit Courts of Appeal.

We respectfully submit there is no conflict between the decision of the Court below with the cases cited by petitioner.

The decision of the Court below states as follows (136 Fed. (2d) 608, 613, 614):

> "The question for decision as to each newspaper separate from any other paper is whether there is substantial evidence that the publisher exercises, or has the right to exercise, sufficient control over the activities of the newsboys defined in its appropriate unit to support the Board's decision that they were employees under Sec. 2(3) of the National Labor Relations Act.
>
> "Each publisher in its brief points out in detail the only testimony relating to it that could support the Board's findings. We shall not attempt to distinguish between the evidence separately referable to each publisher in view of the fact that we believe, even though all the testimony be applied to all petitioners, or that induced upon behalf of each be applied to it alone, that *there is not substantial evidence herein to support the Board's determination that the newsboys are 'employees' of the publishers.* *Cf.* Matter of Houston Chronicle Publishing Co., 28 NLRB 1043."
>
> "We think the Board is *not supported by substantial evidence in its finding that the 'newsboys' are employees of the publisher whose newspaper they vend.*"*

*Emphasis ours.

In *Walker v. Altmeyer* (C. C. A. 2d), decided July 12, 1943 (not yet, at this time, reported), the Court said:

> "It is perfectly clear that the referee had ample evidence in the testimony of the plaintiff to support his finding that the plaintiff performed the same kind of services under the same supervising control of Williamson after the method of computing his pay was changed . . . The facts underlying that decision which were found on substantial evidence were, of course, binding upon the district court."

The quotations from the opinion of the Ninth Circuit Court in this case show clearly that the Court examined the record in the instant case and concluded that the Board's finding of employment was not supported by substantial evidence. In the *Walker* case, the Second Circuit Court examined the record and concluded that the finding of the referee was supported by "ample evidence." The rule of law applied by the Ninth Circuit Court and that applied by the Second Circuit Court is the same, and there is no conflict between the cases.

In *Gray v. Powell*, 314 U. S. 402, respondents, as receivers of the Seaboard Air Line Railway Company, sought exemption of certain coal from the Bituminous Coal Code on the ground that they were both the producer and consumer of the coal. If Seaboard was a producer, it was entitled to exemption. Seaboard leased three mines and contemporaneously with such leases, the landowner lessors, leased to contractors selected by Seaboard, the mining equipment on the leased premises. At the same time Seaboard entered into an operating contract with the equipment lessee, for the extraction of coal and the delivery thereof to Seaboard for consumption. The purpose of The Bituminous Coal Act of 1937 was to stabilize con-

ditions in the industry. The Court discussed the background of the Act and pointed out that captive coal had been defined by Congress in the Bituminous Coal Conservation Act of 1935; that Congress had apparently not considered coal consumed by the producer to have the same disturbing effect on prices as non-code open market coal, and had provided a method of exempting the same, but that Congress failed to define exempt coal as it had defined captive coal in the 1935 Act. Thus Congress delegated the determination of exempt coal to the administrative body.

This Court said:

> "In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here by Sections 4-II(1) and 4-A, the function of review placed upon the courts by Section 6(b) is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner. Shields v. Utah Idaho C. R. Co., 305 U. S. 177, 180, 181, 184, 185, 187, 83 L. ed. 111, 114-118, 59 S. Ct. 160.
>
> "Such a determination as is here involved belongs to the usual administrative routine. Congress, which could have legislated specifically as to the individual exemptions from the code, found it more efficient to delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable adjustment of the conflicting interests of price stabilization upon the one hand and producer consumption upon the other. By thus committing the execution of its policies to the specialized personnel of the Bitumious Coal Division, the Congress followed a familiar practice."

In *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, the Court considered the effect of a determination by the Interstate Commerce Commission, for the purposes of the Railway Labor Act, that the respondent was not an interurban railway. The Act created certain exceptions from its operation and delegated to the administrative agency the fact finding power of determining whether a particular railroad came within the exception. In this instance, also, Congress failed to define interurban. The Court reviewed the evidence taken before the Commission and held that its finding had a basis in substantial evidence, was not arbitrary or capricious, and that in reaching its determination the Commission had not departed from applicable principles of law.

In *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, the Court had again for consideration the effect of a determination by an administrative agency of the factual question that a certain individual did not come within classes excluded from the operation of the Longshoremen's and Harbor Worker's Compensation Act. Again the Court carefully reviewed the evidence taken before the Commission and reviewed the cases considering the meaning of the word "crew". The Court then said:

> "Regarding the word 'crew' in this statute as referring to the latter class, we think there was evidence to support the finding of the deputy commissioner."

In *Rochester Telephone Corp. v. United States*, 307 U. S. 125, the Court again considered a determination of an administrative body that a telephone company was under the control of another and hence not within the exception

declared in the Communications Act of 1934. The Court said:

> "The record amply justified the Communications Commission in making such findings. Investing the Commission with the duty of ascertaining 'control' of one company by another, Congress did not imply artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case."

Each of the above cases concerned Acts of Congress containing exceptions or exclusions from the operation of the respective Acts, the determination of which was specifically delegated to the particular board. In each case the Court reviewed the evidence adduced before the respective administrative bodies and determined that the respective findings of fact were supported by substantial or ample evidence.

In the instant case no claim is made that the vendors in question come within the classes of employees excluded from the operation of the Act by Sec. 2(e) thereof, viz: agricultural laborers, domestic servants and individuals employed by a parent or spouse. On the contrary, this respondent has consistently maintained that the Board has no jurisdiction in this matter, because news vendors are not employees at all; that the determination of this question is not a pure finding of fact, the power to determine which is delegated by Congress to the Board, but rather that the question of the meaning and scope of the word "employee", going, as it does, to the very jurisdiction of the Board, is a question for the Courts, the erroneous determination of which by the Board is not binding upon the Courts, within the doctrine of *United States v. American Trucking Ass'n's., Inc.*, 310 U. S. 534, 544, and *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 654.

The powers of the Courts in this respect are described by the Circuit Court of Appeals for the District of Columbia in *Brotherhood of Railway and Steamship Clerks, etc. v. United Transport Service Employees of America,* ..... Fed. (2d) ....., decided August 2, 1943, and not yet reported, as follows:

> "We are convinced that the Mediation Board, (National Mediation Board) when its good offices were invoked in this case, was called upon to do more than reach a decision on a mere issue of fact, which, if supported by evidence, would be conclusive upon the Courts . . .
>
> ". . . . We are constrained to hold, therefore, that the Board misinterpreted the law applicable to the facts in this case and that its order dismissing appellee's application to be certified as the bargaining agent for the employees concerned, was contrary to law. Full recognition is accorded to the necessarily large discretion vested in the administrative agency in determining the occupational boundaries that comprehend a craft or class . . . As we have pointed out, however, the record raises questions of *law* and *fact* that deserve better than cavalier disposition by both the administrative and the Courts, and the parties are entiled to have them determined in accordance with due processes of law." (Emphasis ours.)

The Third Circuit Court of Appeals announces the same view in *Warner Co. v. Norton,* 137 Fed. (2d) 57, at page 58, as follows:

> "While the question as to whether a particular claimant is 'a master or member of a crew' of a vessel and therefore excluded from the Compensation Act is one of fact, it is necessarily an ultimate con-

clusion to be derived from an application of the statute to the basic findings of fact. As such, it is open to court review for a determination of its validity on the basis of the supportable facts as found by the Commissioner. In short, a Commissioner's conclusion that one is or is not 'a master or member of a crew' is not binding upon a reviewing court if the basic facts competently found by the Commissioner rightly call for a different conclusion."

The Fifth Circuit Court of Appeals takes the same view. In *Jacksonville Paper Co. v. National Labor Relations Board*, 137 Fed. (2d) 148, at 150, the Court said:

"It is not for this Court to say that the Examiner and the Board were in error in believing the testimony of one witness over another. That is the peculiar province of the Board. But the Court is not without power to interpret or construe the testimony of the witnesses whom the Board and the Examiner have chosen to believe. It is within the province of the Court to determine whether or not words spoken and actions taken amount, as a matter of law, to unfair labor practices under Section 8 of the Act. It is the province of the Board to determine whether words were spoken or acts were done. However, the legal effect of the words spoken or acts done, and a determination of whether or not they amounted to a violation of the Act, may be a legal question and within the power of the Court to determine. It is also within the power of the Court to determine whether or not there is a total lack of evidence on which any particular finding could be predicated. It is also within the power of the Court to determine whether or not there is any ambiguity or inconsistency in the findings of the Board."

In *Hillcone S. S. Co. v. Steffen*, 136 Fed. (2d) 965, the Ninth Circuit Court of Appeals, without discussion of the powers of the Court over an administrative finding, rejected the finding of a deputy commissioner and held that the appellee came under the provisions of the Longshoremen's and Harbor Workers' Compensation Act in that the appellee's services were maritime in character, although performed on a vessel out of commission for an indefinite period of time.

2. The Court Below Correctly Determined That the Word "Employee" as Used in the National Labor Relations Act Must Be Given Its Conventional Meaning.

The Court below said: "Since the term 'employee' is not defined by the Act, we agree with petitioner's contention that it must be given its conventional meaning as developed under the common law and statutory enactments." [R. 1848.]

In the Court below, the Board contended for a different meaning, as follows: "Where the persons involved function in a realistic economic sense as employees of an industrial enterprise, Congress intended them to be within the Act." [R. 1847.]

In *Robinson v. Baltimore & O. R. Co.*, 237 U. S. 84, 94, the question was whether or not a contract exempting a railroad company from liability for injuries to a pullman car porter was prohibited by the Employers Liability Act of 1908. The Court held that such prohibition extended only to contracts with employees, and that, inasmuch as the porter was not an employee of the company,

the contract was valid. In determining the meaning of the word employee, the Court said:

> "We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee."

A similar view was taken in connection with express company employees. (*Wells Fargo Co. v. Taylor*, 237 U. S. 84.)

This same view has been expressed in numerous cases specifically dealing with the Social Security Act, so-called social legislation.

Anglin v. Empire Star Mines Co., 129 Fed. (2d) 914;

Texas Co. v. Higgins, 118 Fed. (2d) 636;

United States v. Griswold, 124 Fed. (2d) 599;

Indian Refining Co. v. Dallam, 119 Fed. (2d) 417;

Radio City Music Corp. v. United States, 135 Fed. (2d) 715.

In *Ridge Country Club v. The United States*, 135 Fed. (2d) 718, the Seventh Circuit Court of Appeals, applied the usual and conventional tests of employment in the construction of that term as used in Federal Unemployment and Insurance Contribution Tax Acts. The relationship there in question was quite similar to that involved in some instances in the case involving this respondent. The Court, in holding that in certain of his activities the golf professional was not an employee, said:

> "The pro sustained a *dual* relationship to the club. Concededly, he was an employee as to the annual

retainer, yet an independent contractor when he acted as a shopkeeper and instructor.

"We have not overlooked the fact that these two capacities were bound together by a single contract and that one was dependent on the other. But, looking at the single issue as to the nature of the pro's relationship to the club when giving instructions or operating the shop, we think it clear that he was an independent contractor.

"Both sides point out attributes of the 'employer-employee' and 'independent contractor' relationships, *i. e.*, control by the employer of the employee's activities, right of discharge, etc.

"All those criteria are standard tests used in the several unrelated fields of jurisprudence, *i. e.*, workmen's compensation, principal and agent, contracts, etc."

And the Courts have followed the same rule in connection with the Fair Labor Standards Act, also referred to as social legislation. In *Bowman v. Pace*, 119 Fed. (2d) 859, the Fifth Circuit Court of Appeals denied that the Fair Labor Standards Act created new liabilities, saying:

"The strongly contested issue is whether he was the employee of the Pace Company at all. If not, he cannot recover of that Company. It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law."

In another case involving the Fair Labor Standards Act, the Sixth Circuit Court of Appeals applied the usual and conventional tests of employment. In *Walling*

v. Sanders, 136 Fed. (2d) 78, the Court clearly indicates that an administrative agency must keep within the limits of its delegated power. The Court said:

> "This appeal involving the coverage of the Fair Labor Standards Act, 29 U. S. C. A. Sec. 201 *et seq.*, illustrates to an extent even greater than do others recently considered, the difficulty that confronts a court in delineating the area which Congress has taken over for national supervision of employer-employee relationships in fields hitherto considered within the domain reserved to the states, and illustrates also the persistence of administrative authority to seek the widest possible exercise of granted power. Since abandonment of old distinctions between what is national and what is local, the Congress has not, in commendable ventures in social legislation, granted to administrative bodies coextensive spheres of authority. Enforcement must therefore be kept within the limits both of constitutional and delegated power."

As to the test of employment, the Court said:

> "The usual test by which, in common experience, men determine the employer, is to ascertain who has authority on his own account to 'hire and fire.' But the administrator urges that the term 'employee' as here used is not a word of art but one carefully defined by the statute. He refers to Sec. 3(e) of the Act which defines 'employee' as any individual employed by an employer, and Sec. 3(g) which defines 'employ' to mean 'to suffer or permit to work.' Since the appellee suffers or permits drivers to work for its salesmen, *ipso facto* they work for it. This likewise does not follow. In so broadly defining the word 'employ' Congress undoubtedly had a purpose.

> to relieve complainants of the necessity of proving a contract of employment. The administrator desires us to construe employees so as to include not only those who work for an accused employer, but also those who work for anybody else. Manifestly this would encompass all employed humanity."

None of the aforementioned acts differ in character from the National Labor Relations Act. Their purpose is beneficient and they are liberally construed. Yet in every instance that we have encountered, the various Courts have used the well established and settled criteria, the conventional tests, for the determination of the existence of the employer-employee relationship, and have steadfastly maintained that the beneficent purpose of the Acts could not and did not create new relationships or new liabilities. For these milestones the petitioner would substitute a vague, nebulous and uncertain similitude, called an "employment concept." We believe that such a contention must here be rejected, as a similar contention was by Simons, C. J., of the Sixth Circuit Court of Appeals, in *Hirst and Company v. Geutsch*, 133 Fed. (2d) 247, 249, who said:

> "In a time of evolutionary development in constitutional and statutory interpretation, we are urged to base decision upon a foreshadowing of adjudications to come rather than upon clearly applicable precedents. Whatever course others may take, we are content to adhere to the observation made by us in Ammond v. Pennsylvania R. R. Co., 6 Cir., 125 F. (2d) 747, 751; to which we may add that, until the contrary is demonstrated, we find the rule of *stare decisis* a safer guide to decision than a reading of the stars."

3. The Court Below Correctly Ruled That There Was No Substantial Evidence Supporting the Finding of the Board That Newsboys Are Employees. In So Holding the Court Correctly Applied the Established and Accepted Precedents.

The status of news vendor or newsboy has been frequently considered by the various Courts, and the tests for determining the nature and character of the relationship were well established long prior to the enactment of the National Labor Relations Act. Moreover, these tests were developed not only in connection with "liability at common law," but in the interpretation of statutes of the exact character of the above mentioned Act. As a matter of fact, one of the earliest cases on the subject, *New York Indemnity Company v. Industrial Accident Commission*, 213 Cal. 43, 1 Pac. (2d) 12, involved the interpretation of the word employee as used in the Workmen's Compensation Act of the State of California. The claimant Eustace sold, among others, the newspaper published by this respondent. Although this Act required by its terms that it "shall be liberally construed by the Courts with the purpose of extending" its benefits for the protection of persons injured in the course of their employment (Stats. of Calif. 1917, Ch. 586, Sec. 60—now Labor Code, Sec. 3202), and further provided:

> "The findings and conclusions of the Commission on questions of fact are conclusive and final and are not subject to review." (Stats. of Calif. Chap. 586, Sec. 67—now Labor Code, Sec. 5953)

the Court held the claimant not to be an employee within the meaning of the Act and annulled the award of the Commission.

The rule in the above case was applied by the Court in *State Compensation Fund v. I. A. C.*, 216 Cal. 351, 14 Pac. (2d) 306, to a claim for compensation made by a routeman, and in *Hartford Accident & Indemnity Co. v. I. A. C.*, 123 Cal. App. 151; 10 Pac. (2d) 1035, to a claim made for compensation by a corner news vendor.

The same position has been taken by the Courts of California in cases not involving claims for compensation under the Workmen's Compensation Act.

Bohanon v. McClatchy Pub. Co., 16 Cal. App. (2d) 188, 60 Pac. (2d) 510;

Rathbun v. Payne, 21 Cal. App. (2d) 49, 68 Pac. (2d) 291;

Butt v. San Diego Pub Co., 21 Cal. App. (2d) 429, 69 Pac. (2d) 216.

Like rulings on similar factual statements have been made by the state courts of other states.

Call v. Detroit Journal Co., 191 Mich. 405, 158 N. 36;

Oklahoma Pub. Co. v. Greenlee, 150 Okla. 69, 300 Pac. 684;

Joslin v. Idaho Times Pub. Co. (Idaho), 53 Pac. (2d) 323;

Bernat v. The Star Chronicle Pub. Co. (Mo.), 84 S. W. (2d) 429;

Birmingham Post v. Sturgeon (Ala.), 149 So. 74;

Creswell v. Charlotte News Pub. Co. (N. C.), 168 S. E. 408;

Florida Pub. Co. v. Lourcey (Fla.), 193 So. 847;

Balinski v. Press Pub. Co. (Pa.), 179 Atl. 897;

People v. Masiello, 31 N. Y. S. (2d) 512.

Petitioner states (p. 24, and Footnote 16) that there is diversity of judicial opinion as to how common law and related tests should be applied to news vendors. Petitioner cites several cases and asks that they be compared with the cases cited by the Court below. It is respectfully submitted that the cases cited in Note 16 are not in point.

The facts in the case of *Salt Lake Tribune Publishing Company v. Ind. Acc. Commission*, 99 Utah 259, 102 Pac. (2d) 307, show that there the claimant involved was a *carrier*, not a newsboy. His duties required that he deliver newspapers to the company's subscribers, make collections, and obtain new subscribers. The carrier was required to attend meetings and to keep a list of subscribers, which was the property of the company.

In *Pacific Employers Insurance Co. v. Ind. Acc. Commission*, 3 Cal. (2d) 759, 47 Pac. (2d) 270, the newsboy there involved was paid a "bonus" to insure his exclusive services in the sale of the company's newspaper, and was required to be on the corner during designated hours.

In re Scatola, 282 N. Y. 689, 26 N. E. (2d) 815, concerned a route carrier who delivered newspapers to persons who had subscribed to the publication through the company. The carrier was specifically prohibited from selling on the street newspapers given to him for the purpose of delivery.

In the cases of *Wilson v. Times Printing Co.*, 158 Wash. 95, 290 Pac. 691, *Hampton v. Macon News Printing Co.*, 64 Ga. App. 150, 12 S. E. (2d) 425, and *Gallaher v. Ricketts*, 187 So. 351, no newsboys were involved, but in each instance the claimant was a *route*

carrier, simply performing a delivery and collection service for the publisher.

We have herein (Statement, pp. 2 to 16) epitomized the evidence before the Board. That evidence clearly shows that the news vendors here involved are not employees. It demonstrates that at no time did the petitioner assert or attempt to assert the complete control which is the badge of employment. Nothing in the record shows that respondent was in the position of a "master who has the supreme choice, control and direction of the servant, and whose will the servant represents, not merely in the ultimate results of the work, but in all details." (*Childers v. Commissioner,* 80 Fed. (2d) 27, 30.) The control in all details includes control by the employer of the means and method of performance. (*Fidelity & Casualty Co. v. Ind. Acc. Commission,* 191 Cal. 404, 216 Pac. 578.)

Such control as to means and method must be complete. (*Western Indemnity Co. v. Pillsbury,* 172 Cal. 807, 811.)

The same tests are applied in the Federal Courts. In *Radio City Music Hall Comp. v. United States,* 135 Fed. (2d) 715, 717, the Court considered whether performers in vaudeville acts were employees, for which the theater was required to pay tax. The Court said:

> "The test lies in the degree to which the principal may intervene to control the details of the agent's performance; and that in the end is all that can be said, though the regulation redundantly elaborated it. In the case at bar the plaintiff did inter-

vene to some degree; but so does a general building contractor intervene in the work of his subcontractors. He decides how the different parts of the work must be timed, and how they shall be fitted together; if he finds it desirable to cut out this or that from the specifications, he does so. Some such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees."

Applying the aforesaid tests to the activities of the respondent in this case, we find such activities fall far short of the complete control of an employer over an employee, but instead the evidence demonstrates conclusively that the news vendors here involved were not employees, but were completely free in their choice of "means and methods" of sale.

4. The Application of the Aforegoing Rules to News Vendors in Respect to Their Vending Activities Is Not Changed by the Fact That Certain of Such News Vendors Received "Checks" for Services Performed to Respondent, Separate and Apart From Their Vending Activities.

Certain news vendors are employed by respondent for the limited purpose of distributing to other vendors respondent's newspaper. In such capacity, they are known as "checkmen" or "wholesalers." A complete description of their activities and functions is set forth in the testimony of William J. Harrison, then circulation manager of respondent. [R. 604, 605, 606.]

The nature of the wholesaling activities was also described by several of such wholesalers. [R. 715-722, 750,

785, 840, 933, 934.] The testimony of the wholesalers does not vary in any respect from the testimony of respondent's circulation manager. The salient points of such testimony are as follows:

> "That no newsboy receives checks from the petitioner, except and unless he performs functions as a wholesaler [R. 582]; that services as a wholesaler are rendered apart from and have no connection with the wholesaler's own independent business of selling newspapers on his own account and risk. [R. 606.] This is conceded to be so by the wholesalers themselves. [R. 781.] That wholesalers frequently conduct their selling activities for several hours before they commence their wholesaling activities [R. 702, 840], and that they continue their selling activities for some time after they have completed their wholesaling activities, including checking in to the district managers. [R. 703.] Admittedly the wholesalers are paid a fixed salary by respondent and are carried on its payroll. These facts and others tend to indicate that the wholesalers, to the extent of their wholesaling activities, are employees of the respondent."

The Court below correctly concluded that, though it be conceded that the so-called checkmen are employees of the publisher to the extent that they function as wholesalers, they need not occupy the same status to the extent they function as newsboys. [R. 1851.] To the same effect, see *State Compensation Insurance Fund v. Industrial Accident Commission*, 2 Cal. (2d) 94, 39 Pac. (2d) 201; *Ridge Country Club v. The United States*, 135 Fed. (2d) 718.

Conclusion.

The decision of the Circuit Court of Appeals is correct, and presents no conflict of decisions or unsettled question of Federal law or departure from the accepted and usual course of judicial proceedings. The Board's petition for a writ of certiorari should be denied.

Respectfully submitted,

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